Supreme Court, U.S.
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No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF *AMICI CURIAE* ON BEHALF OF SRiMEDIA AND CORERATINGS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*[1]

SRiMedia PLC ("SRiMedia") is a London based media concern which publishes news and research reports on topics of corporate governance, corporate social responsibility, and socially responsible investment to a global audience. The company and its French and Swiss affiliates comprise the largest publisher of corporate social responsibility news in Europe. The news and reports published by SRiMedia are read widely by European lawmakers, senior corporate executives and compliance officers of some 1200 multinational enterprises, in addition to investment analysts of the top 275 financial institutions in Europe, representing approximately £1.6 Trillion (U.S. $2.52 Trillion) of assets under management. The company also provides news and reports to institutions based in California.

CoreRatings is a London-based ratings agency owned by Fimalac, a publicly-traded French company that is also the majority owner of Fitch Ratings, one of only four rating organizations recognized by the United States Securities and Exchange Commission for the rating of the quality of corporate instruments. Based on both public and confidential information, CoreRatings rates the effectiveness of companies' corporate governance processes and their management of corporate social responsibility risks, including detailed analysis of companies' responses to environmental, social, labor and ethical issues. CoreRatings reports are used widely by the leading European asset management groups in making investment decisions. CoreRatings' clients control in excess of $2 Trillion in investment assets and include among others Barclays Global

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1. Letters from both parties consenting to the filing of all briefs have been filed with the Clerk of this Court. Counsel for the *amici* were the sole authors of this brief. No person or entity other than *amici* made a financial contribution to this brief.

Investors (the world's largest institutional asset manager), ABN Amro (the largest bank in the Netherlands), Allianz (Europe's largest insurance company) and the Swedish and Norwegian state pension systems.

As set forth below, SRiMedia and CoreRatings each has an interest in the outcome of this Court's deliberations regarding the California Supreme Court decision in *Kasky v. Nike* because the decision would deter the corporate transparency which SRiMedia and CoreRatings rely upon, and are intended to serve, by potentially subjecting European companies to suit in California Superior Court for complying with European corporate responsibility reporting law and policy.

SUMMARY OF ARGUMENT

The California Supreme Court decision in *Kasky v. Nike*, 27 Cal. 4th 939 (2002), operates in direct derogation of existing and developing law and policy in the European Union because it discourages the corporate transparency regarding social, ethical and environmental issues that the European Union has made a centerpiece of its support for socially responsible investing and corporate operational activities. More specifically, under the *Kasky* decision a European business entity could potentially be sued in California Superior Court based on allegations that statements it makes in annual reports or other similar publications or to rating agencies were incomplete or misleading, without any requirement of pleading or proving knowing falsity or malice. Thus, the potential imposition of liability against a foreign corporation inherent in the *Kasky* decision violates principles of comity because it raises the potential that a European business entity could be punished for complying with its own laws.

ARGUMENT

I. THE CALIFORNIA SUPREME COURT DECISION IN *KASKY V. NIKE* IS IN DEROGATION OF THE EUROPEAN GOVERNMENTAL MOVEMENT FOR CORPORATE SOCIAL RESPONSIBILITY

A. EUROPEAN GOVERNMENTS AND THE EUROPEAN COMMUNITY ARE ENCOURAGING OR REQUIRING BUSINESS TO REPORT ON SOCIAL, ENVIRONMENTAL AND ETHICAL ISSUES AS PART OF THE MOVEMENT FOR CORPORATE SOCIAL RESPONSIBILITY

SRI Media and CoreRatings urge this Court to overturn the California Supreme Court decision in *Kasky v. Nike, Inc.* (27 Cal. 4th 939 (2002)) because the decision potentially *penalizes* European business enterprises for complying with the growing body of European law and policy for advancing corporate social responsibility and sustainable business operation.

The European Union and companies based in Europe are currently engaged in a vigorous discussion of these issues. They are, in fact, in the process of amending laws and developing policies which already require companies to report to their investors and/or the public regarding the companies' policies about issues such as foreign worker salaries and working conditions, child labor, forced labor and other human rights issues, and environmental problems and sustainability. ("Promoting a European framework for Corporate Social Responsibility, Green Paper of the Commission of the European Communities," COM(2001) 366 final, Brussels 18 July 2001 [hereinafter, "*Promoting a European Framework*"]; *see also* "Concerning corporate social responsibility: a Business contribution to sustainable

development," a Communication from the Commission of the European Communities," COM(2002) 347 final, Brussels 2 July 2002 [hereinafter, "*Communication from the Commission*"].)

The California Supreme Court decision in *Kasky v. Nike* is in direct derogation of this growing body of European law and policy because, as discussed below (*infra*, pp. 11-14), European companies could be subjected to suit in California Superior Court on a theory of strict liability under Cal. Bus. & Prof. Code, sections 17200, *et seq*. and 17500, *et seq*. simply because they comply with such reporting requirements.

Reporting and transparency in the context of socially responsible investing are issues that have been receiving increasing amounts of attention from European governments, business entities and investors. For instance, in July 2000, the United Kingdom amended its Pensions Act of 1995 to address the social and ethical impact of investment choices made by pension fund managers. Mores specifically, this "soft law"[2] enactment required reporting on "the extent (if at all) to which social, environmental or ethical considerations are taken into account in the selection, retention and realization of investments." (Pensions Act of 1995, section 35.)

In May 2001, the European Commission adopted recommendations for corporate disclosure on environmental issues in companies' annual reports. ("On the recognition, measurement and disclosure of environmental issues in the

2. The United Kingdom distinguishes between binding statutory law and administrative "soft laws such as codes, departmental circulars, directives , and statements of practice." (*R v. H.M. Advocate and another*, 2002 UKPC D3 (Transcript).)

annual accounts and annual reports of companies," Recommendation of the Commission of European Communities, C(2001) 1495, Brussels 30 May 2001.) At the same time, Denmark's Ministry of Social Affairs developed and published a "social index" by which companies could *self*-evaluate their compliance with social responsibilities in a manner more readily understandable by the ordinary investor. Another member-nation, France, began to require companies to account for "social and environmental consequences" of their activities in annual reports (*Promoting a European Framework*, *supra*, at p. 18) and to require mutual funds into which French workers invest through their employers to report on their policies regarding socially responsible investing. (*Id*. at p. 22.)

In July 2001, the European Commission published a "Green Paper" (policy draft) intended to identify goals and elicit comment from member states, business entities, investors and citizens. (*Promoting a European Framework*, *supra*.) This "Green Paper" noted that the movement to corporate social responsibility was being driven by concerns about globalization, sustainable development and the increasing role of social criteria in both individual and institutional investment. (*Id*. at p. 5.)

The European Commission published the resulting *Communication from the Commission* (*supra*, COM(2002) 347) one year later. It noted that it had received more than 250 responses to the "Green Paper" from employer groups and business organizations, labor organizations, governmental bodies, and individual member states. The Commission noted that while all participants agreed to the usefulness of the public comment process, there were (not surprisingly) significant differences in the positions

expressed by various groups. Significantly, however, many of the various groups considered transparency, by reporting and/or accountability, as crucial to the advancement of socially responsible investing:

> Investors stressed the need to improve disclosure and transparency of companies' practices, rating agencies' methodology and investment management of SRI (socially responsible investment) funds and pension funds;
>
> Consumers' organizations underlined the importance of trustworthy and complete information about the ethical, social and environmental conditions in which goods and services are produced and traded to guide them in their purchase choices;
>
> . . .
>
> The European Parliament proposed to mainstream [corporate social responsibility] [and] called for triple bottom line reporting by companies on their social and environmental performance, including the human rights dimension.

(*Id.* at pp. 4-5.)

Thus, "transparency" regarding corporate conduct became one of the linchpins of the Commission's analysis:

> Transparency is a key element of the CSR debate as it helps businesses to improve their practices and behaviour; transparency also enables business and third parties to measure the results achieved

> . . . Greater transparency also prevents companies from being used for organized crime, and terrorist groups to launder or generate money for their benefit.

(*Id.* at p. 13, and footnote 4.)

The foregoing examples demonstrate that Europeans are committed to making corporate responsibility a central aspect of their institutional and individual investment climate. The Commission of European Communities has made clear that corporate transparency concerning ethical, social and environmental issues is a corollary of this commitment to corporate responsibility. As discussed below (*infra*, pp.11-14), the California Supreme Court decision in *Kasky v. Nike* is in direct derogation of this existing and developing public commitment because it exposes the corporations who comply by reporting, and the entities that publish their statements to investors and the public, to suit in California Superior Court; further it exposes to suit those entities that rate corporate activities in the CSR arena based on information derived from public and confidential company information. It does so because the decision announces a broad expansion of the definition of "commercial speech" designed drastically to lessen First Amendment protection.

B. The Problematic Aspect Of The *Kasky* Decision Is Rooted In Its Impossible Expansion of The Definition Of "Commercial Speech"

The California Supreme Court's decision improperly exposes corporate statements regarding their operations to liability by lumping them in with advertising concerning corporate products. (*Kasky v. Nike*, *supra*, 27 Cal. 4th 939, 961.)

As the Court is aware, the *Kasky* decision arose from an attempt by Nike, Inc. to respond to allegations that their overseas workers were subjected to improper, dangerous and/or illegal work conditions. (*Id.* at 947.) Nike hired former United States Ambassador to the United Nations, Andrew Young, to investigate; thereafter, Nike publicized his conclusions that there was no evidence of unsafe or illegal working conditions. (*Id.* at 947-948.) The Plaintiff, Kasky, brought suit against Nike in San Francisco County Superior Court, alleging that Nike had violated California's Unfair Competition Act (Cal. Bus. & Prof. Code, section 17200, *et seq.*) by *negligently* or *carelessly* having made false or misleading statements regarding its foreign work conditions. (*Id.* at 948.)[3]

The Superior Court sustained Nike's demurrer to Kasky's complaint without leave to amend, and the California Court of Appeal affirmed, on the ground that the responses to public accusations were speech subject to the "absolute" protection of the First Amendment to the United States Constitution and Article I, section 2(a) of the California Constitution. (*Id.*)

The aspect of the *Kasky* decision reversing the Court of Appeal and permitting suit against Nike that is especially problematic is the California Supreme Court's extension of liability for alleged false advertising beyond statements regarding products or services being offered, to include "representations of fact about the **business operations**, products or services of the speaker . . . made for the purpose of promoting sales of, or other commercial transactions in,

3. Because California law allows any person to act as a private attorney general in such suits, Mr. Kasky does not have to have any personal knowledge of these allegations, nor to have suffered any injury as a result of any activity undertaken by Nike.

the speaker's products or services." (*Id.* at 961, emphasis added.) The *Kasky* decision then broadens the definition of products and services to the point where the lesser protection afforded commercial speech would cover any conceivable communication by any commercial enterprise:

> [W]e understand 'product references' to include [] statements about the manner in which the products are manufactured, distributed, or sold, about repair or warranty services that the seller provides to purchasers of the product, or about the identity or qualifications of persons who manufacture, distribute, sell, service or endorse them. Similarly, references to services would include not only statements about the education, experience, and qualifications of the persons providing or endorsing the services.

(*Id.* at 961.)

This brief is concerned with the effect of the *Kasky* decision on European companies complying with corporate responsibility laws and policies, not specifically with the error inherent in the *Kasky* re-definition of commercial speech. However, one example may suffice to demonstrate the problematic effect of the decision on speech, hitherto unquestionably protected absolutely by the First Amendment, which potentially would subject parties to suit in California Superior Court.

Consider statements to the press in the context of labor disputes, whether by an employer or union, which would now fall within the expanded definition of commercial speech because the statements would concern the manner in which

the employer or union conducted their "business operations." Based on *Kasky*'s expanded definition, a union could allege that the employer's claims about fairness of work conditions were made with an eye to protecting its place in the market, and an employer could allege that the union's claims about unfairness were made to enhance the union's standing with potential members. Each party would then be susceptible to allegations that their "negligence" or "carelessness" was responsible for incomplete or misleading statements. Thus, any labor dispute (already a contentious situation), would have the added potential of suit in California Superior Court for disgorgement of profits pursuant to California's Unfair Competition Law.

Whether or not this scenario is permitted to operate within California, under California law, is not the issue presented by this brief. However, the possibility that European business entities could be subjected to suit in California Superior Court for alleged unfair advertising, based on actions taken in Europe in attempted compliance with European law and policy, compels reversal or reduction of the *Kasky* expansion of the definition of "commercial speech."

C. The Potential That European Businesses Could Be Hauled Into California Superior Court Based On Their *Compliance* With The European Policy Of Transparency Regarding Corporate Responsibility Violates Basic Principles Of Comity

This Court should reverse or reduce the *Kasky* expansion of the definition of "commercial speech" because European business entities should not be subjected to suit in California Superior Court based on their attempted compliance with European law and policy encouraging transparency in the context of corporate responsibility. As set forth above (*supra*, pp. 4-7), the movement for socially responsible investment is being incorporated into European Union law, and transparency regarding social, ethical and environmental issues is considered a centerpiece of this developing policy. Any law that discourages or deters corporate transparency would be in direct derogation to a policy announced and pursued by the European Union and its member nations, and therefore violates notions of international comity. For a single *state* in the United States to impose such law on European business entities is simply impermissible.

This Court has defined comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." (*Hilton v. Guyot*, 159 U.S. 113, 164 [16 S. Ct. 139, 40 L. Ed. 95] (1895).) Most simply put, comity should be observed when U.S. law *pro*scribes what foreign law *pre*scribes.

This is precisely the situation in which European business entities will find themselves if *Kasky* is left intact. European law will increasingly *pre*scribe the inclusion of statements

regarding their corporate policies on social, ethical and environmental issues in annual reports and other publications aimed at investors and the public. The nature and content of this inclusion will be defined by European law. By complying with this law, however, European entities will potentially expose themselves to suit in California Superior Court based on allegations that they made *pro*scribed statements in their "negligence and carelessness" that were incomplete, or misleading, even if they fully conform to the requirements of European law.

In the context of Federal antitrust law, there is a conflict in Federal decisional authority regarding what will suffice to establish the sort of conflict between U.S. and foreign law triggering the operation of comity. Some decisions in the context of Federal antitrust law have set the bar extremely high: "What is required to establish a true conflict is an allegation that compliance with the regulatory laws of both countries would be impossible." (*Filetech S.A. v. Fr. Telecom S.A.*, 157 F.3d 922, 932 (2d Cir. 1998), quoting *In re Maxwell Communication Corp.*, 93 F.3d 1036, 1050 (2d Cir. 1996).) Other decisions find it sufficient when enforcement of a U.S. regulation would make compliance with a foreign statute "difficult to imagine." *See, e.g., Trugman-Nash, Inc. v. New Zealand Dairy Bd.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997.) However, *no* Federal decision is found that permits a single State in the United States to impose its will *via* extension of its statutory scheme to subject foreign entities to potential liability for complying with their own laws.

The potential exposure is not illusory: California's "long-arm" statute permits its Superior Courts to "exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." (Cal. Code

Civ. Proc. section 410.10.) The only limitation that California places on the exercise of jurisdiction on a non-resident is the due process requirement that it not violate "traditional notions of fair play and substantial justice." (*Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal. 4th 434, 444 (1996).) Even where a non-resident's contact with California is nearly non-existent, California courts will exercise jurisdiction based on a weighing of the connection of the non-resident's *conduct* to California. (*Integral Development Corp. v. Weissenbach*, 99 Cal. App. 4th 576, 583-584 (2002), citing *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 [104 S. Ct. 1868, 80 L. Ed. 2d 404] (1984).)

This broad reading of jurisdiction potentially applies to European companies reporting their compliance with social, ethical or environmental goals in Europe, regardless of whether they have a single facility, or sell a single product, in California. Consider the hypothetical case of a European business attempting to comply with the emerging law and policy on transparency and corporate responsibility. If a California individual or institution considered investing in the company, it is probable that the prospective investor would consider annual reports and/or commercial analyses based on those reports, or ratings undertaken by one of the few SEC recognized rating agencies. The *Kasky* expansion of the definition of commercial speech could be applied to this information, arguably "representations of fact about the business operations . . . made for the purpose of promoting . . . commercial transactions in [] the speaker's products or services." (*Kasky, supra*, 27 Cal. 4th at 961.)

The potential for harm extends beyond European business entities to organizations such as *amici* herein, whose operations are dependent on information from business

entities regarding social, ethical and environmental aspects of the business entities' operations. Amicus are largely, if not entirely, dependent on the business entities on whom they are reporting for the information the collect and analyze. Any significant disincentive to report such information has an immediate negative impact on SRiMedia and CoreRatings.

It must also be noted that it is no defense to this problem to claim that foreign corporations are only liable for false or misleading statements because the *Kasky* decision extends susceptibility to suit under California's unfair competition and false advertising scheme. (*Id.* at 969-970.) This exposure, which includes potential liability for disgorgement of profits, does not require knowing falsity or malice: liability may be imposed based only on "negligence or carelessness," just as the California Supreme Court permitted against Nike. (*Id.* at 948.) Furthermore, suit in California Superior Court brings with it California's liberal discovery policy. (*Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 375-76 (1961); *see* likely European reaction, immediately below.)

Not to oversimplify the issue, but no one wants to be sued anywhere, much less in California. The potential that private attorneys general, that is any resident of California, could haul foreign business entities into California Superior Court and require them to defend suits whose potential exposure includes disgorgement of profits would, in and of itself, act as a disincentive to European companies to comply with the emerging law and policy of corporate transparency. This is in direct derogation of the existing and developing law and policy of the European Union: it potentially penalizes conduct that the European Union prescribes. Principles of international comity call for the reversal or substantial reduction of the *Kasky* decision's virtually unlimited expansion of commercial speech.

D. Negative Results Other Than Discouraging Corporate Transparency Are Likely To Accrue If *Kasky* Is Not Reversed

There are negative results beyond the affect on corporate transparency that will likely accrue if the *Kasky* expansion of the definition of commercial speech is left intact. For example, the simplest means by which a foreign business entity could try to avoid potential suit in California Superior Court based on statements in investment reports is to proscribe communications in or to the United States, investment by Americans, or the purchase or sale of its products or services to Americans. Commentators have long recognized the deleterious effect on American investment opportunities attendant on attempting to impose American regulation on foreign commercial conduct:

> [E]xtraterritorial jurisdiction reduces the range of investments available to American investors. Rather than being able to choose from the full array of securities issued around the world, American investors are limited to those that comply with American disclosure requirements. In other words, U.S. law travels with the investor. As a result, the investor will be less able to diversify her portfolio internationally.

(Choi and Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. Intl. L. & Bus. 207, 226 (Fall 1996).)

Furthermore, the extension of potential liability by *Kasky* is likely to elicit retaliatory legislation by the European Union or its member nations. For example, the discovery procedures

embraced by American courts are not viewed with universal admiration in Europe. Thus, in response to extraterritorial application of American antitrust laws, European nations have in the past enacted statutes whose sole purpose was to impede discovery outside the United States. (Griffin, *Jurisdiction and Enforcement: Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 Geo. Mason L. Rev. 505, 505-06, and see footnotes 3-7.) Indeed, one European Union member nation, France, went so far as to *criminalize* requests for information "with a view to foreign judicial or administrative proceedings or in connection therewith." (*Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 526 n.6 [107 S. Ct. 2542, 96 L. Ed. 2d 461] (1987), quoting French Penal Code, Law No. 80-538.) "These anti-discovery statutes were followed by laws rendering certain types of U.S. antitrust judgments unenforceable in foreign courts [and] legislation creating a statutory cause of action to recover damages paid in satisfaction of U.S. antitrust judgments ('clawback' legislation) . . ." (Griffin, *Jurisdiction and Enforcement*, *supra*.)

There is one more probable effect of leaving the *Kasky* decision unchanged, one that is unavoidably speculative but still bears stating. As set forth above, the European Union has made a public policy of encouraging socially responsible investing, and made corporate transparency on social issues a centerpiece of that policy. The disincentive to this policy created by *Kasky* will create the impression, justified or not, that the United States is more concerned with permitting private citizens (from one state, California) to litigate allegations concerning false advertising than it is with permitting the European Union to move ahead with its goals concerning corporate responsibility. At a minimum, the

United States may be perceived as being more interested in insuring that the small number of false statements be penalized than enabling an emerging culture of corporate candor. It would surely be unfortunate if this were the ultimate result of the *Kasky* decision.[4]

E. This Court Should Restore Free Speech Protection To Communications Regarding Social Responsibility

Amici herein respectfully submit that Petitioner Nike's request that the Court reverse the *Kasky* decision should be granted. At a minimum, the California Supreme Court's unlimited expansion of the definition of commercial speech should be addressed. The expansion, along with its attendant reduced First Amendment protection, works most if not all of the potential mischief in the *Kasky* decision. (*Kasky*, *supra*, 27 Cal. 4th 939, 960-62.) The overbroad definition exposes all business entities, including those in other countries, to strict liability for purported incomplete or misleading information, and based not on the intent to deceive, but on mere "negligence and carelessness."

At a minimum, therefore, this Court should rule that the absolute protection of the Constitution's First Amendment applies to speech by a commercial entity concerning or related issues of corporate responsibility or socially responsible investment. Subject only to the constraints of this Court's decision in *New York Times Co. v. Sullivan* (376 U.S. 254 [84 S. Ct. 710, 11 L. Ed. 2d 686] (1964)) and its progeny (knowing, malicious falsity), speech about social issues connected to business should be free of incumbrance.

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4. This would also be unfortunate in light of the recent major U.S. business scandals based at least in part on a lack of transparency.

CONCLUSION

For the reasons set forth above, *Amici* SRiMedia and CoreRatings respectfully submit that the decision of the California Supreme Court in *Kasky v. Nike* should be reversed.

Respectfully submitted,

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